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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM A.D. 1973

No. 73-390

CLEMENS K. SHAPIRO, et al.,

Petitioners,

vs.

CHARLES J. BARRETT, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW.

The opinion of the Illinois Supreme Court (App. "B" of Petition) is reported at 54 Ill.2d 237, 296 N.E.2d 342.

REASONS FOR DENYING THE WRIT.

(1) Petitioners, who are natural persons owning personal property for their own personal enjoyment or in the operation of a sole proprietorship, clearly do not represent fiduciaries and their beneficiaries; and fiduciaries, both corporate and individual, and their beneficiaries are not now and have never been, at any stage of the proceedings in the State Trial Court, the Illinois Supreme Court, or in the proceedings before this court, a party nor represented by a party.

(2) The allowance of the writ would be inconsistent with this Court's settled refusal to entertain a petition by parties (the natural person and sole proprietor petitioners herein) in whose favor the final judgment in the State court of last resort was rendered, i.e., exemption from the imposition of ad valorem personal property taxes.

(3) Petitioners have failed to specify the stage in the proceedings in the court of first instance and the appellate court, at which, and the manner in which, they raised the federal questions sought to be reviewed, as required by Rule 23, Paragraph 1(f) of the Rules of the Supreme Court of the United States.

STATEMENT.

The following statement of the case is made in order to correct omissions in the statement filed by petitioners:

The parties in *Lehnhausen* v. *Lake Shore Auto Parts Co.*, No. 71-685, consolidated with *Edward J. Barrett, Clerk of Cook County, et al.*, petitioners, v. *Clemens K. Shapiro, et al.*, respondents, No. 71-691, as set forth in the opinion of this Court in 409 U.S. 1103, and in the prior opinion of the Illinois Supreme Court in *Lake Shore Auto Parts Co.* v. *Korzen*, 49 Ill.2d 137 (July 1971) were:

Plaintiffs:

Clemens K. Shapiro (one of the Petitioners herein), a natural person, owning personal property in his own name and owning real property jointly with his wife, none of which property is owned or used in the operation of or for purposes of business, and all of which property is owned and used for his personal enjoyment and that of his family.

Jerome Herman (the other Petitioner herein), a sole proprietor, d/b/a The Spot, a natural person who owns and operates a business as a sole proprietor.

Guy S. Ross and Eugene D. Ross, natural persons operating a business, as a partnership, which owns personal property.

M. Weil & Sons, Inc., an Illinois corporation, the owner of personal property.

Lake Shore Auto Parts Co., an Illinois corporation, the owner of personal property.

Eugene Maynard, a natural person, also acting on behalf of one high school district and three grade school districts.

Defendants:

Robert J. Lehnhausen, Director, Department of Local Government Affairs of the State of Illinois.

Edward J. Barrett, County Clerk.
P. J. Callerton, County Assessor.
Bernard J. Korzen, County Treasurer.
George E. Keane, Member of the County Board of Tax Appeals.
Harry H. Semrow, Member of the County Board of Tax Appeals.

On March 29, 1973, petitioner Clemens K. Shapiro, in a verified petition filed with the trial court, alleged that the individuals who were members of his class were exempt from tax and entitled to refunds. (Supp. R. 1-3)

On June 15, 1973, Jerome Herman similarly alleged, in an unverified petition, that the members of his class (sole proprietors) were exempt from personal property tax and entitled to refunds. (Supp. R. 6-10)

On August 10, 1973, following the issuance of the supplemental opinion by the Illinois Supreme Court on remand from the Supreme Court of the United States, the trial judge in the Circuit Court of Cook County, Illinois, entered orders finding that the individuals constituting members of the Shapiro class of natural persons and the Jerome Herman class of natural persons doing business as sole proprietors were exempt from the personal property tax and entitled to refunds of personal property taxes paid for 1971 and subsequent years. (Supp. R. 14-16 and 20-22)

On May 4, 1973, certain fiduciaries, both corporate and individual, and their beneficiaries filed a complaint in the Circuit Court of Cook County, entitled *Harding et al. v. Kluczynski et al.*, Case No. 73 L 4728, (Supp. R. 26-38) alleging therein, among other things, that there were not parties to or represented as members in the consolidated *Shapiro v. Barrett* litigation, and that the supplemental

opinion of the Illinois Supreme Court on remand from this Court was not binding on them; and that:

> **"unless plaintiffs and the class members they represent are declared exempt from taxation under Article IX-A, plaintiffs and their respective class members will unjustly and arbitrarily be denied equal protection of the law in contravention of Article 1, Section 2 of the Illinois Constitution of 1970 and the Fourteenth Amendment to the United States Constitution by reason of the fact that the tax, although assessed in the name of the fiduciary, is not against the fiduciary but against the beneficiary, minor, incompetent, heir or legatee, all of whom are natural persons, the fiduciary being the mere conduit through which the tax upon the property of a natural person is levied. More specifically, a tax would thus be imposed on personal property of an incompetent held by a conservator, which, if held directly by a competent adult, would be exempt from tax; a tax would be imposed on personal property of a decedent's estate during the period of administration, while the same personal property if held directly by the heir or legatee, would be exempt from tax; and a tax would be imposed on personal property held by a fiduciary for the use or benefit of natural persons, while the same personal property if held directly by said natural persons would be exempt. The effect of the foregoing would be to burden unjustly those natural persons least capable of enduring such tax, i.e., widows, children, the infirm, the aged and the incompetent—when the identical personal property held directly by other natural persons escapes tax completely. As so construed, the entire Article IX-A would be void and illegal and of no force and effect whatsoever."**

Said *Hanley v. Kaeper* proceeding, docketed as Case No. 79 L 6728, is still pending in the Circuit Court of Cook County.

ARGUMENT.

I.

A party cannot invoke the jurisdiction of this Court to vindicate asserted federal rights of absent third persons.

The rule of fundamental importance, with which all jurisdictions are in full agreement, is that a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute. As this Court stated in the case of *Roberts & Schaefer Company* v. *Louis L. Emmerson, as Secretary of State for the State of Illinois, et al.*, 271 U.S. 50, 54 and 55; 70 L.Ed. 827, involving an Illinois corporation and the imposition of a state franchise tax on a domestic corporation, measured by its authorized capital stock:

> "But the plaintiff is not in a position to raise this question. As this court has often held, one who challenges the validity of state taxation on the ground that it violates the equal protection clause, cannot rely on theoretical inequalities, or such as do not affect him, but must show that he is himself affected unfavorably by the discrimination of which he complains. (Citation of cases omitted.) The plaintiff cannot complain that the tax is measured by authorized, instead of issued, capital stock, because all of its authorized capital stock has been issued. Any discrimination that exists operates, therefore, in plaintiff's favor."

See also *Wilder Tileston* v. *Abraham S. Ullman, State's Attorney, et al., of the City of New Haven*, 318 U.S. 44, 45, 87 L.Ed. 603. wherein this Court stated:

> ". . . There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. . ."

See also *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586; *First National Bank* v. *Louisiana Tax Com.*, 289 U.S. 60, 77 L.Ed. 1030; and *Shearer* v. *Burnet*, 285 U.S. 228, 76 L.Ed. 724.

The controlling question is whether the petitioner ". . . has sustained or is immediately in danger of sustaining some direct injury as the result of its [the Statute's] enforcement . . ." *Massachusetts* v. *Mellon*, 262 U.S. 447, 488; 67 L.Ed. 1078. Clearly neither Clemens K. Shapiro, the natural person, nor Jerome Herman, the natural person, d/b/a The Spot, nor any member of their respective classes are in any danger of sustaining any injury—on the contrary, the final judgment of the Illinois Supreme Court on remand has confirmed their exemption from the imposition of ad valorem personal property taxes; and the trial court, in accord therewith, has found and ordered on August 10, 1973, that both the individuals who are members of the class represented by Clemens K. Shapiro and the natural persons who own personal property and do business as sole proprietors, are entitled to refunds of the personal property taxes paid by them, and each of them, for the year 1971 and subsequent years.

The obvious fact here is that petitioners cannot represent natural persons and sole proprietors, and at the same time also represent fiduciaries and beneficiaries since "all members of a class must have a common right or

interest and the representation must be for the common benefit of all and cannot be to the injury of any." *Weberpals* v. *Jenny*, 300 Ill. 145. See also *Dierks* v. *Thompson*, 414 Fed.2d 453, 456 (1st Cir. 1969); *South East Nat. Bank* v. *Board of Education*, 298 Ill. App. 92, 127, 128; 18 N.E. 2d 584, 598. The conflict of interest is readily apparent here where the alleged violation of federal rights of fiduciaries and beneficiaries would, if successful, render Article IX-A to the Illinois Constitution of 1870 unconstitutional and void, thereby reimposing the personal property tax on natural persons and sole proprietors who have already been declared by the Illinois Supreme Court to be exempt from personal property taxes and entitled to refunds.

The record is abundantly clear that neither a fiduciary (corporate or individual) nor a beneficiary has ever been a party in the *Lehnhausen* v. *Lake Shore Auto Parts Co.* consolidated with *Edward J. Barrett* v. *Shapiro* proceedings, nor represented by any of the parties to said proceedings.

II.

A writ of certiorari is not granted to a petitioner in whose favor a judgment has been entered.

We would also point out to this Court that to grant the writ of certiorari here petitioned for by Clemens K. Shapiro and Jerome Herman and their respective classes, would be wholly inconsistent with this Court's settled refusal to entertain an appeal by a party in whose favor the lower court rendered its judgment. See *Public Service Commission* v. *Brashear Lines*, 306 U.S. 204, 206; 83 L. Ed. 608.

III.

The requirements of Rule 23, Paragraph 1(f) of the Rules of the Supreme Court of the United States are jurisdictional.

The party invoking this Court's jurisdiction has the burden, as Rule 23, Paragraph 1(f) states, to: ". . . specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and in the manner in which, the federal questions sought to be reviewed were raised; . . ."

Petitioners have not, and cannot, meet this burden by reason of the simple, obvious fact that, never having represented fiduciaries or beneficiaries, there was never, nor could there have been, any occasion or entitlement to timely raise federal constitutional issues of such absent third persons (that is, fiduciaries and beneficiaries).

Petitioners made no allegations challenging the validity of Article IX-A on the ground that it denies equal protection of the laws to fiduciaries and beneficiaries at the trial court level in their complaint; or before the Illinois Supreme Court on appeal from the trial court order; or in the proceedings before this Court, reported in 409 U.S. 1103; nor in the Suggestions and Memorandum filed with the Illinois Supreme Court upon remand from this Court. The first suggestion of this federal question as it relates to fiduciaries and trustees was made by petitioners in their petition for rehearing following the issuance by the Illinois Supreme Court of its supplemental opinion after remand from this Court.

The Supreme Court of Illinois has repeatedly held that constitutional claims cannot be raised for the first time at

the appellate level, much less on a petition for rehearing in connection with a supplemental opinion after remand from the Supreme Court of the United States. *The People* v. *Mallett* (1970), 45 Ill.2d 388; 259 N.E.2d 241; *The Railway Passengers and Freight Conductors' Mutual Aid and Benefit Association* v. *Anna Leonard* (1879), 166 Ill. 154; 46 N.E. 756.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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